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## Truck driver's bid for reinstatement hits roadblock

By Barbara Rabinovitz

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A commercial truck driver's claims that his employer had discriminated against him by not allowing him to return to work after he was treated for a psychiatric disorder came to a dead end last month when the Massachusetts Supreme Judicial Court ruled that the claims should not have been allowed to go to a Superior Court jury.

The SJC ruling had the effect of sparing the defendant, a trucking company, more than \$1 million in damages and counsel fees.

Citing what he sees as the significance of the decision, Boston attorney Gary M. Feldman, of Davis, Malm & D'Agostine, who represented the defendant on appeal, said the case is "one of the very few cases in which a Massachusetts appellate court has reversed a judgment for failure of the trial judge to grant a judgment notwithstanding the verdict."

To buttress his contention about the unusualness of the case, Feldman quoted SJC Chief Justice Margaret H. Marshall, who wrote the opinion for a unanimous court, as saying: "Seldom does an appeal present itself to us in a posture that requires us to nullify an entire, completed civil jury trial."

Cambridge, Mass., attorney Jeffrey M. Feuer, who, with his partner, Lee D. Goldstein, represented the plaintiff before the SJC, criticized the decision for being "completely results-oriented."

Feuer said that "it's pretty clear, at least in my memory, that the SJC has never upheld a jury verdict of \$1 million or more in favor of an employee." Its finding in this case, he contended, reflects "a pattern not to uphold jury verdicts in favor of an employee of more than \$1 million."

Feuer also was critical of the court for not following the example of the jurors. "The SJC was not able to do what the jury was able to do, which is to move beyond the prejudices people

have about people who are labeled as being mentally ill," he said. "Rather than addressing the merits of the case, [the SJC justices] fell back on a procedural issue to overturn the jury's verdict."

### Connecting the DOT

The case, *Everett v. The 357 Corp.*, pivoted on Joseph R. Everett's allegation of discrimination on the part of the trucking corporation and on a Norfolk Superior Court jury's finding that the company had discriminated against him by refusing to

reinstatement him in 1999. An earlier discrimination claim by Everett had resulted in a finding for the defendant. A doctor's evaluation led the trucking firm to deny him reinstatement "for the lawful reason," the SJC said, "that he would likely be a danger to himself or others on the road."

Having failed to obtain certification required by the U.S. Department of Transportation

that he did not have any conditions that would pose a risk on the highways, Everett filed a complaint with the Massachusetts Commission Against Discrimination, Feldman said in recounting the case.

In December 1998, the MCAD issued a lack of probable cause determination.

Early in 1999, Everett enlisted the backing of his union, a local of the International Brotherhood of Teamsters, which filed a grievance against his employer that sought to have him reinstated.

"They submitted documentation that he had been successfully employed driving a truck," Feldman said, noting that Everett, in January 1997, had been cleared to drive by "a doctor of his own choosing."



Attorney Gary M. Feldman

The jury in Norfolk Superior Court sided with the defendant in what Feldman referred to as "the 1997 events" but found that the company had discriminated against Everett by refusing to reinstate him after "the 1999 events."

Feldman said that money judgment for damages was in excess of \$757,000 and more than \$370,000 in counsel fees.

The 357 Corp., which had been represented by Davis Malm for several years, turned to its longtime law firm to handle the appeal.

### No prima facie case

Feldman said that his argument before the SJC focused on two points: Everett failed to file a complaint with the MCAD regarding the 1999 events; and his failure to appeal the dispute over his medical certification denied the Superior Court of jurisdiction.

Acknowledging that the case presented "complicated issues and facts," Feldman interpreted the SJC ruling as addressing his two-pronged argument.

"The court upheld the legal proposition that you can't bring a discrimination case in Superior Court without having first filed a complaint in the MCAD and [the U.S. Equal Employment Opportunity Commission]," he said. "And the court said the primary jurisdiction was applicable and that the dispute should have gone to the DOT for resolution."

According to Feldman, the DOT has sole authority over the resolution of disputes involving the medical qualifications of commercial truck drivers, and he contended that Everett had failed to appeal the dispute in his case to the DOT.

Citing the SJC ruling, Feldman said the court made clear that the DOT — "and not a state or federal judge or jury" — has to decide whether the driver is qualified to drive.

"The SJC stated that without a valid DOT certification a driver cannot make out a prima facie case," he said. **NEIH**

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**— Jeffrey M. Feuer,  
co-counsel for plaintiff**